

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs October 25, 2005

**STATE OF TENNESSEE v. DERRICK MICHAEL SWANSON**

**Appeal from the Criminal Court for Sullivan County**  
**No. S47,995; S47,997     Phyllis H. Miller, Judge**

---

**No. E2004-02645-CCA-R3-CD - Filed February 24, 2006**

---

The Appellant, Derrick Michael Swanson, appeals the sentencing decision of the Sullivan County Criminal Court following the revocation of his community corrections sentences. In March 2004, Swanson was placed in community corrections after pleading guilty to twelve offenses stemming from two separate multi-count indictments. The convictions, which included felony and misdemeanor offenses, resulted in an effective six-year sentence. In September 2004, Swanson was charged with a violation of his community corrections supervision based upon new arrests. Following a violation hearing, Swanson's effective six-year community corrections sentence was revoked and he was resentenced to an effective nine-year sentence to be served in the Department of Correction. At the conclusion of the hearing, Swanson was additionally convicted of criminal contempt for making an obscene gesture while leaving the courtroom. On appeal, Swanson argues that the trial court erred by: (1) ordering that his sentences be served in incarceration; (2) increasing his effective sentence to nine years; and (3) summarily finding him guilty of criminal contempt. After review, we find no error in the trial court's sentencing decisions. Accordingly, Swanson's effective nine-year sentence in the Department of Correction is affirmed. We conclude, however, that the record does not support the trial court's finding of summary contempt. Accordingly, this conviction is reversed and dismissed.

**Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed as to Sentencing; Reversed  
and Dismissed as to Summary Contempt**

DAVID G. HAYES, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and NORMA MCGEE OGLE, JJ., joined.

William A. Kennedy, Blountville, Tennessee, for the Appellant, Derrick Michael Swanson.

Paul G. Summers, Attorney General and Reporter; Blind Akrawi, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and Robert H. Montgomery, Assistant District Attorney General, for the Appellee, State of Tennessee.

## **OPINION**

### **Factual Background**

On August 27, 2003, a Sullivan County grand jury returned two indictments against the Appellant in two separate cases. In case number S47,995, a six-count indictment was returned charging the Appellant with: (1) theft of property over \$10,000; (2) reckless endangerment; (3) resisting arrest; (4) evading arrest; (5) driving on a suspended license; and (6) DUI. In case number S47,997, a true bill was returned charging the Appellant with: (1) aggravated assault; (2) leaving the scene of an accident with injury; (3) violation of registration; (4) failure to maintain proof of financial responsibility; (5) DUI; and (6) driving on a suspended license. On December 2, 2003, the Appellant pled guilty to all charges in both cases. In case number S47,995, he was sentenced to three years for theft of property over \$10,000, two years for reckless endangerment, six months for resisting arrest, two years for evading arrest, six months for driving on a suspended license, and eleven months and twenty-nine days for DUI. The sentences were ordered to be served concurrently. In case number S47,997, the Appellant was sentenced to three years for reckless aggravated assault, eleven months and twenty-nine days for leaving the scene of an accident, thirty days for violation of registration, thirty days for failure to maintain proof of financial responsibility, eleven months and twenty-nine days for DUI, and six months for driving on a suspended license, all to be served concurrently. However, the two sentences were ordered to be served consecutively to each other for a total effective sentence of six years, which was to be served on community corrections.

On September 2, 2004, the Appellant was arrested and charged with domestic assault and resisting arrest. A community corrections violation warrant was issued alleging that the Appellant had violated the terms of his community corrections supervision by receiving new criminal charges. Following a hearing on September 30, 2004, at which the Appellant pled guilty to the violation, the trial court revoked the Appellant's community corrections sentences and enhanced the theft of property sentence to six years, resulting in an effective nine-year sentence to be served in the Department of Correction. Additionally, the trial court found the Appellant to be in contempt of court for making an obscene gesture to his community corrections officer at the conclusion of the hearing. The Appellant was sentenced to ten days for criminal contempt, which was to be served consecutively to the sentences in case numbers S47,995 and S47,997. This appeal followed.

### **Analysis**

#### **I. Department of Correction Confinement**

First, the Appellant argues that the trial court abused its discretion in ordering that the Appellant's sentences be served in the Department of Correction. He asserts that "[c]ounseling and treatment, not incarceration are the appropriate remedies and punishment" due to the Appellant's serious alcohol problem. Moreover, the Appellant argues that because he was a standard offender convicted of a Class C felony, he is presumed to be a favorable candidate for alternative sentencing. This argument is misplaced. This court has consistently held:

[T]hat while the consideration of sentencing principles is mandatory in determining a defendant's original sentence, "reference to these principles is not necessary in determining the appropriate sanction following revocation of probation." *State v. Howard Luroy Williamson, Jr.*, No. 02C01-9507-CC-00201 (Tenn. Crim. App. at Jackson, Sept. 30, 1996); *see also State v. Stevie Q. Taylor*, No. 02C01-9504-CC-00108 (Tenn. Crim. App. at Jackson, May 1, 1996) (application of sentencing principles appropriate to appellant's case concluded upon imposition of sentence).

*State v. Walter Jackson*, No. E1999-02186-CCA-R3-CD (Tenn. Crim. App. at Knoxville, Jan. 24, 2001). Tennessee Code Annotated section 40-36-106(e)(4) (2003) provides:

The court shall also possess the power to revoke the sentence imposed at any time due to the conduct of the defendant or the termination or modification of the program to which the defendant has been sentenced, and the court may resentence the defendant to any appropriate sentencing alternative, including incarceration for any period of time up to the maximum sentence provided for the offense committed, less any time actually served in any community-based alternative to incarceration.

At the violation hearing, the Appellant admitted that he had violated the conditions of community corrections supervision. The record also reflects that the Appellant was provided with the opportunity to pursue treatment and counseling for his alcohol problem during his placement in the community corrections program, but he chose not to do so. After review, we conclude that the trial court did not abuse its discretion by ordering that the Appellant's sentences be served in the Department of Correction.

## **II. Increased Sentences**

Next, the Appellant contends that the trial court erred by increasing his sentence for theft of property from three to six years. Specifically, he argues that the court failed to give him "any credit as mitigation for having pled guilty to the [community corrections] violation and the underlying offenses concerning the violation. Further, [the trial judge] did not give him any credit for working and going to school." A trial court has the power, upon revocation of a community corrections sentence, to resentence a defendant to a period of incarceration up to the maximum for the offense originally committed. T.C.A. § 40-36-106(e)(4). The purpose of allowing the trial court to impose a new sentence is that the nature, circumstances, and frequency of the Appellant's violations may "warrant a different type of alternative sentence or incarceration." *State v. Ervin*, 939 S.W.2d 581, 583 (Tenn. Crim. App. 1996).

When a trial court chooses to resentence a defendant to a sentence more severe than the original, the trial court must conduct a sentencing hearing pursuant to the principles of the Sentencing Reform Act. *State v. Cook*, 2 S.W.3d 238, 240 (Tenn. Crim. App. 1998); *Ervin*, 939 S.W.2d at 583. It is mandatory for the trial court to state on the record the reasons for imposing a

new sentence. *State v. Gauldin*, 737 S.W.2d 795, 798 (Tenn. Crim. App. 1987). The record reflects the trial court's findings in this case.

The trial court applied three enhancement factors in setting the Appellant's sentence at six years: (1) prior criminal history; (2) previous unwillingness to comply with the conditions of a sentence involving release into the community; and (3) that the felony was committed while on parole status. *See* T.C.A. § 40-35-113 (2), (9), (14) (2003). We find that the record amply supports application of these factors. The pre-sentence report, which the Appellant did not contest, shows prior Iowa convictions for two violations of a no contact order, domestic abuse assault, child endangerment, domestic abuse, theft, criminal mischief, driving while a barred habitual offender, driving with a revoked license, and burglary. Additionally, the Appellant admitted using marijuana, cocaine, methamphetamine, and "acid" at various times in the past. Clearly, these convictions constitute an extensive criminal history and support application of factor (2). With regard to factors (9) and (14), we also find these factors sufficiently established by the record. The Appellant admitted to violating the conditions of his community corrections supervision. Moreover, the pre-sentence report indicates that there is an outstanding warrant for his arrest from Iowa for parole violation. We do not find it error for the court to refuse to mitigate the Appellant's sentence based upon his pleading guilty to the community corrections violation or the fact that he worked at Ed's Auto Repair and attended technical school studying auto mechanics. Based upon application of the enhancement factors found, the trial court was clearly justified in increasing the Appellant's three-year sentence for Class C theft to that of six years. A sentencing hearing was properly conducted, and the court expressly stated its reasoning for the enhancement on the record. This issue is without merit.

### **III. Contempt**

Last, the Appellant argues that the trial court's summary finding of criminal contempt was error. He contends that because the alleged conduct constituting the contempt was not committed in the court's presence, the conduct was punishable only as an indirect contempt which would require notice and a scheduled hearing.<sup>1</sup>

In Tennessee, the court's authority to punish certain acts as contempt derives from statute and is limited to the forms of conduct set forth in Tennessee Code Annotated section 29-9-102. Relevant to this case, Tennessee Code Annotated section 29-9-102(1) (2003), permits punishment for contempt of court stemming from "[t]he willful misbehavior of any person in the presence of the court, or so near thereto as to obstruct the administration of justice . . . ."

The trial court's Order of Contempt, in pertinent part, recites:

---

<sup>1</sup>The State asserts that the Appellant has waived this issue by failing to prepare an adequate record for review, specifically a transcript of the hearing. *See* Tenn. R. App. P. 24(b). However, we find the Appellant's inclusion of the order, reciting the specific facts of the incident, sufficient to allow review.

At the conclusion of the hearing, as the defendant was being led by Sgt. Mark Gott past the prosecution table, the defendant turned toward Mr. Canter [Community Corrections Supervisor]. Assistant District Attorney General Montgomery exclaimed that the defendant just “flipped a bird” at Mr. Canter. This was confirmed by Mr. Canter, who testified under oath to same.

While the defendant’s obscene gesture was not seen by the Court, it was made in the presence of the Court and while persons other than court personnel and the parties were present.

**WHEREFORE IT IS ORDERED AND ADJUDGED** that the defendant, Derrick Michael Swanson, was in contempt of court by his making an obscene gesture in the presence of the Court and by thus exhibiting in open court extreme disrespect for the court;

In *State v. Maddux*, our supreme court observed that

there are two species of contempt, direct and indirect, which differ, among other ways, in the minimal procedures that will satisfy the requirements of due process in the case of each. Direct contempt is based upon acts committed in the presence of the court, and may be punished summarily. Indirect contempt is based upon acts not committed in the presence of the court, and may be punished only after the offender has been given notice, and the opportunity to respond to the charges at a hearing. With respect to these criteria, an act not committed in the presence of the court is treated as indirect contempt even though the act may be admitted by the offender in open court.

571 S.W.2d 819, 821 (Tenn. 1978) (internal citations omitted).

Moreover, the provisions of Tenn. R. Crim. P. 42 reflect the distinction between direct, or summary disposition proceedings, and indirect proceedings. A criminal contempt may be punished summarily if the judge certifies that he or she saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. Tenn. R. Crim. P. 42(b) provides that an indirect criminal contempt shall be prosecuted by notice, specifically stating:

The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the district attorney general or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest.

It is observed from a reading of Rule 42(a) authorizing summary disposition that the judge is required to certify that he or she saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. (emphasis added). Thus, the term “actual presence” under Rule 42(a) is narrower than the term “presence” as used in Tennessee Code Annotated section 39-9-102. This is not to say that willful misbehavior not committed in the actual presence of the court which obstructs the administration of justice may not be prosecuted as an act of contempt. Rather, it means that the act of contempt must be prosecuted as an indirect contempt because the trial court is not capable of certification as required by Rule 42(a). Because the Appellant’s alleged act of misconduct was not seen by the trial judge or committed in the actual presence of the trial judge, the court’s finding of summary contempt was error.

Moreover, we conclude that had the Appellant been prosecuted for indirect contempt under the provisions of Tennessee Code Annotated section 39-9-102, the conduct, as alleged, would not have supported a finding of contempt. To sustain a conviction for indirect criminal contempt under this provision, there must be proof beyond a reasonable doubt (1) of misconduct, (2) in the presence of the court, (3) committed with the intent to obstruct the proceedings, and (4) that the administration of justice is obstructed.

The term “in the presence of the court” has been liberally defined in indirect criminal contempt proceedings to mean that “the ‘court’ consists not of the judge, the courtroom, the jury or the jury room individually, but all of these combined, and that the court is present whenever any of its constituent parts is engaged in the prosecution of the business of the court according to law.” 17 AM. JUR. 2D.*Contempt* § 9 (1990); *see also Ex parte Savin*, 131 U.S. 267, 9 S. Ct. 699 (1889).

Although we conclude that the Appellant’s willful misbehavior occurred in the presence of the court for purposes of indirect contempt, we conclude, however, that his gesturing with the middle finger, or in street vernacular, “flipping the bird,” did not obstruct the administration of justice. *See Eaton v. Tulsa*, 415 U. S. 697, 94 S. Ct. 1228 (1974) (reference by defendant at trial to his alleged assailant as “chicken shit” did not constitute an imminent threat to the administration of justice). The Appellant’s obscene gesture in this case, while reprehensible, was not directed at the judge, jury, or any court officer. The gesture could not be construed as a threat and did not occur during the course of the proceedings, nor did it interfere or prevent the judge or any court officer in carrying out the court’s duties.

## CONCLUSION

Based upon the foregoing, we conclude that the trial court did not abuse its discretion in increasing the Appellant’s effective community corrections sentence to reflect an effective sentence of nine years and in ordering that his sentences be served in the Department of Correction. Thus, with respect to those convictions, the judgment of the Sullivan County Criminal Court is affirmed. However, we conclude that the Appellant’s conviction and sentence for criminal contempt must be reversed and dismissed due to non-compliance with Tenn. R. Crim. P. 42(a).

---

DAVID G. HAYES, JUDGE